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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

SPECIAL COPY

NO. 79-6715

ALVIN CULBERSON, Petitioner

v.

STATE OF MISSISSIPPI, RESPONDENT

PETITIONER'S REPLY BRIEF

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September 26, 1980

IN THE

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No. 79-6715

ALVIN CULBERSON, Petitioner

v.

STATE OF MISSISSIPPI, RESPONDENT

PETITIONER'S REPLY BRIEF

For his reply to the opposition brief of Respondent, Petitioner respectfully states as follows:

I.

STATE ADMITS ERROR IN INSTRUCTION ON MITIGATING FACTORS

In its opposition brief the state indicates that in arriving at its recommendation of sentence to be imposed the correct approach is that followed in Florida where the jury is permitted to consider as a mitigating factor the sentence imposed upon an accomplice. Although the state claims this was done in the present case (Opposition Brief, pp. 16-17), this claim is not supported by the record.

In the only instruction given at the sentence phase the jury was advised what mitigating factors it could consider. These included the age and circumstances surrounding the life and character of the defendant, as well as the circumstances surrounding the commission of the offense. They did not include the sentence received by the accomplice (R.287-289).

The fact that there was evidence adduced during the trial concerning this disparity in sentence is of no help to petitioner.

The jury simply was not instructed by the trial judge that it could consider this disparity as a mitigating factor. Now that the state has admitted that the jury should have been so instructed, we believe this is grounds for reversal.

II.

ABUSE OF DISCRETION IN DENYING CONTINUANCE TO OBTAIN CRITICALLY NECESSARY DEFENSE WITNESSES

The state claims there was no abuse of discretion when the trial judge denied petitioner's request for a continuance to obtain critically necessary witnesses, since the testimony of these witnesses hardly adds a new dimension to the case.

In Hardy v. United States, 186 U.S. 224 (1902), cited on page 49 of the state's brief, the Court examined the proposed testimony for which the continuance was sought, in light of the other evidence in the case, in order to determine whether the trial court abused its discretion in refusing a continuance. The Court concluded that nothing of significance would have been added by the additional evidence. In fact, the Court noted, there was danger of losing some of the prosecution witnesses who might not be available at a later date if a continuance had been granted.

Here the circumstances are quite different. The court was advised that the absent witnesses were critically necessary to the defense, and the court was told how and why they were familiar with the facts of the proposed testimony. The only objections by the state were that the motion came too late, and that it was improper to clutter up the record with what the witnesses would say (R.71). Defense counsel informed the court what would be proved by the absent witnesses, and thus the rule in this regard was substantially complied with. The court was thus able to determine whether the testimony of such witnesses was really significant. The state made no objection to

absence of an affidavit, and under the circumstances this requirement was either met or was waived by the state.

The court below concluded that the testimony of the witnesses who did appear on the motion for new trial "hardly adds a new dimension to appellant's case, although it must be acknowledged that Cora Thompson's testimony about Pittman's demonstration could have possibly affected his credibility." The "demonstration" referred to was Pittman's boastfully pointing to himself as the one who shot and killed Evans. This testimony should have been heard by the jury, since it was diametrically opposed to what Pittman testified, and concerned the central issue of this capital murder case. (Compare also the affidavit of Pittman at R.200).

The jury should also have heard the testimony of Skinner and Robinson which according to the court below raised "an ambiguity concerning ownership of the gun."

The effect of the denial of the request for a continuance was to put the defendant to trial without a single defense witness, i.e. without any defense at all. This was prejudicial to the extreme, and was most assuredly an abuse of discretion by the trial court. Under the test of Hardy v. United States, supra, we submit this was a classic case of abuse of discretion, and warrants reversal of this cause.

III.

DENIAL OF DUE PROCESS

In its response to Petitioner's argument under Point I, regarding unreliability of accomplice testimony, the state has conveniently changed the question and the facts to fit its argument and suggested conclusion. The state has omitted the qualification of unreliability with regard to the testimony of the accomplice

witness in this case. Petitioner insists on the question and argument as they appear in his original Petition as proper under the record of the case.

The Mississippi Supreme Court, in its vigorous effort to uphold the Mississippi death penalty statute, has glossed over some rather significant due process requirements necessary for the protection of one who is charged under these statutes. What has happened, for example, to the requirement that the jury be permitted to hear all of the evidence, not merely the evidence for the state? What has happened to the long-standing rule that the jury is the sole judge of the credibility of witnesses?

Bearing in mind that the jury judges the credibility of witnesses, it is incumbent upon the trial court to see to it that the jury has all the evidence available and needed to render a proper verdict on this issue. The jury should have heard Cora Thompson's testimony about Pittman's boast that he killed Evans. The jury should have also heard the witnesses who were near the scene and who saw and heard Pittman soon after the crime was committed (ownership of the gun issue).

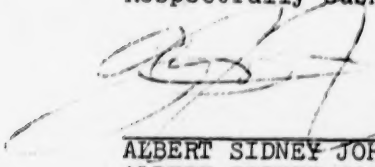
The court below felt that a satisfactory explanation regarding the contradictory affidavit was offered because Pittman thought his life was in danger (opinion p. 503). Was not Pittman's life also indanger when he made the deal to testify for the state? If he would lie under the one circumstance, who can say he would not lie under the other? While Pittman's testimony may not have been unbelievable on its face, it was certainly at best unreliable (and this is all petitioner has argued).

CONCLUSION

For all of the foregoing reason, together with those contained in his original Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

DATED: September 26, 1980.

Respectfully submitted,



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